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No. 00-335

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KIM MICHAEL HAINZE,

Petitioner,

v.

ED RICHARDS, Williamson County Sheriff; STEVE ALLISON, KEVIN HALLMARK, and SCOTT ZION, Williamson County Sheriff's Deputies, individually and in their official capacities; and WILLIAMSON COUNTY, TEXAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

I. Course of Proceedings Below

On November 20, 1997, just four days after having been shot as a result of his knife attack on Respondent Allison, Petitioner filed his complaint in federal district court. By his complaint, Petitioner alleged the use of excessive force against him in violation of his federal civil rights and a variety of state law causes of action. He also sought relief under Title II of the Americans with Disabilities Act (hereinafter the "ADA") and Section 504 of the Rehabilitation Act (hereinafter "Section 504"). The district court dismissed all of Petitioner's claims on Respondents' various motions for summary judgment. Following Petitioner's appeal, the Fifth Circuit affirmed the judgment of the district court.

II. Statement of Facts

On November 16, 1997, Respondents Allison, Hallmark, and Zion were certified peace officers with the Patrol Division of the Sheriff's Department of Williamson County, Texas. Respondent Allison was certified as a mental health officer having completed a special training program implemented by the Williamson County Sheriff's Department. Respondent Allison was also certified as a firearms instructor and a field training officer. (Rec. at pp. 429-524.)

In the early morning hours of November 16, 1997, Respondents Allison, Hallmark, and Zion were dispatched to a convenience store in Williamson County, Texas in response to a 911 call involving Petitioner. Allison and Zion

were together in a patrol car driven by Allison. Allison was supervising Zion as his field training officer. Allison and Zion were primary responders to the call with Hallmark responding in a separate patrol car as back up. (Rec. at pp. 429-524.)

The dispatch to the officers was based upon a 911 call from Alicia Cluck, the aunt of Petitioner. The dispatch was initiated as a welfare call due to Ms. Cluck's request for assistance in involuntarily transporting Petitioner to St. David's Pavilion Hospital for mental evaluation. In response to Ms. Cluck's call, the dispatcher informed the officers that Petitioner was possibly suicidal, that he had been drinking and had taken anti-depressants, that he had a knife with a four inch blade which he intended to use to confront the officers, and that a family member had placed the 911 call. Additionally, the dispatcher gave the officers a general description of Petitioner, including the fact that he was not wearing any shoes on that cold morning. The officers were not informed that any family members would be present at the scene when they arrived. (Rec. at pp. 429-524.)

Upon arriving at the scene, the officers unexpectedly found Petitioner standing at the passenger side door of a pickup truck containing two unidentified individuals. Allison assumed the lead position at the scene. Allison parked his patrol car behind the pickup truck. Hallmark pulled his vehicle behind and to the right of Allison's car. The three officers exited their vehicles. Allison positioned himself behind the driver side door while Zion stood on the passenger side of their vehicle. Hallmark moved to the front and right of his vehicle. (Rec. at 429-475.)

Upon exiting his vehicle and inquiring of Petitioner whether he was "Michael," Allison saw Petitioner attempt to open the passenger door of the pickup truck. The truck's door appeared to be locked with the window raised. Allison instructed Petitioner to move away from the truck. Petitioner ignored the command and responded with profanity and aggression toward Allison. In doing so, Petitioner turned toward Allison. It was at this point Allison observed the four inch knife blade in Petitioner's hand. In response to Petitioner displaying the knife, Allison and the other two deputies drew their handguns and aimed their weapons at the Petitioner. (Rec. at pp. 429-475.)

Within less than 20 seconds of exiting his vehicle, Deputy Allison was attacked by Petitioner. When Petitioner was within four to six feet of Allison and raising the knife, Allison fired two shots into the body of Petitioner. During this attack, Allison twice ordered Petitioner to stop. Petitioner ignored those commands and instead increased his speed as he approached Allison. Allison waited until the last possible moment before shooting Petitioner. (Rec. at 429-475.)

The uncontroverted summary judgment evidence established that the force used by Allison was appropriate and reasonable. The Williamson County Sheriff's Department had an established policy for the use of force in the seizure of persons. That policy applied to all calls to which officers respond. The Department implemented a program whereby officers were given training and certification for responding to mental health calls. (Rec. at pp. 429-524; pp. 1120-1121.) In October, 1992, Williamson County conducted a self-evaluation for compliance with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, though it admittedly did not include an

analysis of its law enforcement policies in respect to welfare calls. (Rec. at pp. 979-1118.)

The uncontroverted evidence also established that a mental health call is treated identically to any other call until the officers arrive at the scene and are able to assess the situation independent of the dispatched information. Additionally, the officers treat a mental health call as any other call until such time as they have control of the situation and are assured that all parties involved are safe and that the area is contained. This is the procedure which the deputies used in responding to the 911 call for Petitioner. (Rec. at pp. 429-447; pp. 477-524.) Petitioner did not present any summary judgment evidence in contravention of the reasonableness and appropriateness of these policies and procedures.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS IMPROPERLY NAMED RESPONDENTS ALLISON, HALLMARK, ZION AND RICHARDS AS PARTIES TO THIS APPEAL

In seeking this writ, Petitioner addresses only the ADA and Section 504 claims of his complaint. (Pet. at 8, note 5.) In doing so, Petitioner has waived all other claims.[1] Petitioner's causes of action under the ADA and Section 504 were asserted solely against Respondent Richards in his official capacity as the Sheriff of Williamson County and

1. Petitioner's complaint in district court asserted causes of action based on § 1983 and pendent state law claims in addition to the ADA and Section 504 claims.

Respondent Williamson County. With the Petition failing to include any claims against Allison, Hallmark, Zion and Richards, individually, they have been improperly included as respondents to this petition. For this reason, the Court should deny the Petition as to Respondents Allison, Hallmark, Zion and Richards, individually.

II.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISMISSAL OF PETITIONER'S ADA AND SECTION 504 CLAIMS

The Fifth Circuit correctly determined that Petitioner's ADA and Section 504 claims fail as a matter of law and therefore summary judgment was appropriate. (Pet. App. A at 4a.) As the Fifth Circuit accurately stated:

> A disabled plaintiff can succeed in actions under Title II if he can show that, by reason of his disability, he was either "excluded from participation in or denied the benefits of the services, programs, or activities of the public entity," or was otherwise "subjected to discrimination by any such entity."

(Pet. App. A at 6a-7a; citing 42 U.S.C. § 12132 (1994), *Patrice v. Murphy*, 43 F. Supp. 2d 1156 (W.D. Wash. 1999), and 29 U.S.C. § 794(a) (1994)). The Fifth Circuit determined that based on the facts of this case, Petitioner was "neither denied the benefits of a service, program or activity" nor "subjected to discrimination" by reason of his disability when Allison used reasonable force to defend against Petitioner's attack with a deadly weapon.

A. Actions against Petitioner did not violate the ADA and Section 504.

Petitioner's arguments are based on an over generalization of the Fifth Circuit's ruling. Petitioner asserts that the Fifth Circuit's ruling establishes that the "services, programs, or activities" clause of the ADA never applies to "the non-arrest and pre-arrest activities of law enforcement personnel." (Pet. at 11.) Contrary to Petitioner's assertion, the Fifth Circuit did not create such an expansive exception to the ADA by its ruling but instead carefully tailored its opinion to the facts of this case. (Pet. App. A at 10a-11a.)

The Fifth Circuit held that the circumstances associated with Allison's "quick discretionary decision made in self-defense and for the safety of those at the scene" are not subject to the ADA and Section 504. (Pet. App. A at 11a.) With the deputies having no knowledge of who occupied the pickup truck or if they had been harmed by Petitioner, the deputies' first concern rightfully was one of public safety rather than the mental health accommodation of Petitioner. The Fifth Circuit acknowledged by its ruling that once the officers had secured the scene and ensured that there was no threat to human life the mandates of the ADA and Section 504 to accommodate the needs of Petitioner would have applied. (Pet. App. A at 10a-11a.)

This ruling by the Fifth Circuit is consistent with the paucity of case law on the issue and with the House Judiciary Committee Report on the ADA referenced in the Petition. The opinions of the few courts which have addressed ADA claims arising from arrests can be categorized under two theories. The first involves a wrongful arrest of a disabled person because the officer misperceived the lawful effects

of the disability as unlawful activity. *Gohier v. Enright*, 186 F.3d 1216, 1220 (10th Cir. 1999). Identical to the findings in *Gohier*, Allison's use of force in defending himself against Petitioner's attack was not based on a misperception of the lawful effects of Petitioner's disability, inasmuch as Petitioner's attack was not lawful. As the Fifth Circuit correctly pointed out:

> Hainze was not denied the benefits and protections of Williamson County's mental health training by the County, Sheriff Richards, or the officers. Rather, Hainze's assault of Allison with a deadly weapon denied him the benefits of that program.

(Pet. App. A at 9a.) Like the officer in *Gohier*, Allison reasonably thought it necessary to shoot Petitioner to avoid serious harm or death. *Id.* at 1222. Therefore the force used against Petitioner was warranted and as such Petitioner was not discriminated against because of his disability.

The second category of cases involves circumstances where the "police properly investigated and arrested a person with a disability for a crime unrelated to that disability, they failed to reasonably accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees." *Id.* at 1220-21. Petitioner argued that Williamson County's policy of treating mental health calls the same as criminal response calls until such time as the officer has assessed and secured the scene was in effect a failure to reasonably accommodate the disability of Petitioner. In response to this argument, the Fifth Circuit held that "Title II does not apply to an officer's on-the-street responses

to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life." (Pet. App. A at 10a.) To hold otherwise would jeopardize law enforcement's ability to act in time to stop a fleeing suspect, physically control the situation or to protect public safety. *Patrice v. Murphy*, 43 F. Supp. 2d 1156, 1160 (W.D. Wash. 1999).

B. Petitioner failed to state a claim under the "self evaluation" requirements of the ADA.

Petitioner's only other claim under the ADA was that Williamson County failed to conduct a self-evaluation of its existing policies and procedures in compliance with the Justice Department's regulations.[2] In order to prevail on his claim for failure to complete a self-evaluation, Petitioner must causally connect the County's failure to a "concrete threat of discrimination." *Tyler v. Kansas Lottery*, 14 F. Supp. 2d 1220, 1225 (D. Kan. 1998). There was no threat of discrimination which existed as to the claims of Petitioner because Williamson County had implemented a program to specially train its officers in how to handle mental health crises, which extended the training they received during the general peace officer certification courses. The summary judgment established there was no causal link between the lack of an evaluation and the shooting of Petitioner. The evidence was clear that Allison was trained as a mental health officer to respond to the situation with Petitioner and that Allison's actions in that regard were reasonable and prudent. A self-evaluation would not have

2. 28 C.F.R § 35.105(a).

better prepared Allison for this event. As such, the Fifth Circuit correctly ruled that the Petitioner lacked standing for injunctive relief.

III.

THE FIFTH CIRCUIT'S RULING DOES NOT CONFLICT WITH CASE LAW IN OTHER CIRCUITS, CONGRESSIONAL INTENT NOR INTERPRETIVE FINDINGS BY THE DEPARTMENT OF JUSTICE

Petitioner's argument that a conflict exists between the Fifth Circuit's ruling in the case at bar and the holdings of this court, the holdings of other circuits, and congressional intent misconstrues the holding of the Fifth Circuit as well as the holdings to which Petitioner contends there is a conflict. The Fifth Circuit's ruling was narrowly tailored to the facts of this case. Further, its holding does not create an exception to the application of the ADA to law enforcement which is inconsistent with the purpose behind the enactment of this law or with the holdings of other courts.

This Court clearly mandated the application of the ADA to jails and prisons in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998). Though the Court emphasized the breadth of the language used by Congress in enacting the ADA to support its application of the ADA to jails and prisons, the Court's opinion falls short of establishing an absolute application of the act to every discretionary function of local law enforcement.

As discussed in Section II.A. above, the limited courts which have addressed this issue are not in conflict. The only circuit court decision cited by Petitioner having an opposite

outcome from the case at bar is *Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998). A review of the legal analysis in that case rather than its outcome indicates that no conflict exists between the circuits. The Eighth Circuit determined that the Kansas City Police Department had a duty to reasonably accommodate the plaintiff's spinal cord injury during post-arrest transportation. *Id.* at 910. The issue of reasonable accommodation prior to or during the arrest was not before the court.

As the Fifth Circuit correctly points out in its opinion, the only court which has dealt with the specific issues of the case at bar is the Tenth Circuit in *Gohier v. Enright*, *supra*. (Pet. App. A at 7a.) The Tenth Circuit's survey of cases on the issue of applying the ADA to arrests concluded there were two potential theories of analysis.[3] The first theory is based on the "wrongful arrest" of a disabled person. *Gohier*, 186 F.3d at 1220. The second is based on the failure to accommodate the person's disability during a proper arrest, as was the case in *Gorman v. Bartch*, *supra*. *Id.* at 1220-21. Based on the posture of that case, the Tenth Circuit left open the question of whether either or both categories of cases were within the scope of the ADA. *Id.* at 1221.

The rational behind the "wrongful arrest" category of cases is congruent with the policy statement of the House Judiciary Committee Report on the issue cited by Petitioner.[4]

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3. The court defined "arrest" in the broadest sense, including "arrests; investigations potentially involving an arrest . . .; and violent confrontations not technically involving an arrest, as in [that] case." *Gohier*, 186 F.3d at 1220, note 2.

4. Specifically, H.R. Rep. No. 101-485, pt. III, 101st Cong., 2nd Sess. 50. (Pet. at 16.)

The example given by that report in support of the need for this legislation is that persons with epilepsy are often arrested because officers have not been trained to recognize and distinguish seizures from unlawful activities. Stated another way, persons with epilepsy are often wrongfully arrested because officers misperceive the lawful effects of their epilepsy as unlawful activity.

The Fifth Circuit did not take exception to the application of the ADA to "wrongful arrest" cases. The case at bar simply does not constitute a "wrongful arrest" of Petitioner, i.e., the force used by Allison was reasonable based on the unlawful attack by Petitioner.

Likewise, the Fifth Circuit did not take exception to the reasonable accommodation cases such as *Gorman v. Bartch*, supra. The court specifically stated that "once the area was secure and there was no threat to human safety, the Williamson County Sheriff's deputies would have been under a duty to reasonably accommodate [Petitioner's] disability in handling and transporting him to a mental health facility." (Pet. App. A at 11a.) Based on the circumstances of this case, the deputies never had an opportunity to address the needs of Petitioner.

The Fifth Circuit's holding is well founded in public policy and is consistent with the general analysis of this and other courts. The Fifth Circuit's ruling in essence creates a public policy exception to the ADA where all individuals are to be treated equally by law enforcement until such time as there are assurances that no threat exists to human life. Once public safety has been assured, then the special needs of the disabled individual takes precedent. This clearly meets with the spirit of the ADA in preventing discrimination

against the disabled while at the same time balancing the needs of the public as a whole. This analysis by the Fifth Circuit fits squarely within the framework of all prior case law and the congressional intent behind this act.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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